UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALORICA, INC. AND ITS SUBSIDIARY/AFFILIATE EXPERT GLOBAL SOLUTIONS, INC.,	)	**CASE NO. 18-CA-190846**
AND	)	
OPEIU, LOCAL 153, OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO	)	

ALORICA, INC. AND ITS SUBSIDIARY/AFFILIATE EXPERT GLOBAL SOLUTIONS, INC.,	)	**CASE NOS. 25-CA-185622 and 25-CA-185626**
AND	)	
SETH GOLDSTEIN AND OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 153	)	

RESPONDENT ALORICA INC. AND ITS SUBSIDIARY/AFFILIATE EXPERT GLOBAL SOLUTIONS, INC.'S RESPONSE TO NOTICE TO SHOW CAUSE SUPPORTING REMAND TO ALJ OLICERO FOR FURTHER PROCEEDINGS CONSISTENT WITH THE BOARD'S DECISION IN *THE BOEING COMPANY*

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INTRODUCTION

Pursuant to the Notice to Show Cause issued at the direction of the Board on October 29, 2018, Respondent Alorica Inc. and its subsidiary/affiliate Expert Global Solutions, Inc. ("Respondent") respectfully submits its response in support of remanding the above-captioned matter to Administrative Law Judge ("ALJ") Melissa M. Olivero for further proceedings consistent with the Board's decision in *The Boeing Company*, 365 NLRB No. 154 (2017). In *Boeing*, the Board overruled the "reasonably construe" test of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Although ALJ Olivero did not specifically cite *Lutheran Heritage* as the basis for her Decision, the cases on which she relied to conclude that Respondent's mandatory arbitration agreement could reasonably be read to prohibit the filing of unfair labor practice charges were premised on the "reasonably construe" test of *Lutheran Heritage*. *See* ALJ Decision JD-86-17 ("ALJD") (October 18, 2017) at sl. op. 5 *citing 2 Sisters Food Group*, 357 NLRB 1816 (2011) and *U-Haul Co. of California*, 347 NLRB 375. 377-378 (2006) *enforced* 255 Fed. Appx. 527 (D.C. Cir. 2007). Accordingly, the above-captioned case should be remanded to ALJ Olivero for further proceedings consistent with the analysis set forth in *Boeing*. Although the ALJ may reopen the record at her discretion, Respondent submits that the evidence in the record is complete and further evidence is not required.

ARGUMENT

I. This Case Should Be Remanded to the ALJ.

Citing *2 Sisters Food Group, supra*, ALJ Olivero concluded that Respondent's Arbitration Agreement (the "Agreement") "would reasonably be read to prohibit the filing of unfair labor practice charges … even if it does not explicitly restrict access to the Board" (ALJD at 5). The Board, in *2 Sisters*, relied on *Lutheran Heritage* to conclude that certain work rules at issue in that case violate the Act because employees might reasonably construe them to restrict

protected activity. 357 NLRB at 1816. Next, without substantive explanation or analysis, and citing the Board's decision in *U-Haul of California, supra,* ALJ Olivero concluded that the language in the Agreement stating that the Agreement "applies to 'any disputes which may arise between us concerning your employment by the Company'" could be reasonably understood by "[n]on-lawyer employees … as excluding the filing of unfair labor practice charges from the purview of the agreement" (ALJD sl. op. at 5). The Board in *U-Haul of California* relied on the "reasonably construe" standard of *Lutheran Heritage* to conclude that the employer's arbitration policy violated the Act because "the language of the policy is reasonably read to require employees to resort to the [employer]'s arbitration procedure instead of filing charges with the Board" 375 NLRB at 377.

Based on the foregoing, there's no question that ALJ Olivero's Decision relies on the "reasonably construe" standard of *Lutheran Heritage*. Because the Board has overturned that test, this matter should be remanded to ALJ Oliver for her to analyze the record in light of the new test set forth in *Boeing*. The "reasonably construe" test which forms the basis of the Board's Decision in *2 Sisters* and *U-Haul of California* no longer is the applicable standard and ALJ Olivero should review her conclusion under *Boeing*.

II. Respondent's Arbitration Agreement Is Lawful under *Boeing*

In *Boeing*, the Board overruled the "reasonably construe" test of *Lutheran Heritage* and announced a new standard for determining whether the maintenance of a facially neutral work rule, such as the Agreement here, violates the Act. In her Decision, ALJ Olivero recognized that the Agreement is silent on an employee's right to pursue a remedy at the NLRB thereby placing the Agreement in the "facially neutral" category – it does not prohibit or limit a Section 7 right. Further, considering the criteria of *Lutheran Heritage* as applied in *2 Sisters* and *U-Haul of California*, ALJ Olivero recognized the absence of evidence to show that the Agreement was not

promulgated in response to union activity or that the Agreement was applied to inhibit Section 7 rights. Hence, the only question for ALJ Olivero was whether the Agreement could be "reasonably construed" to prohibit employees from filing unfair labor practice charges. Following the applicable Board precedent at the time she issued her decision, ALJ Olivero concluded that an employee would not understand the Agreement does not restrict his/her right to file an unfair labor practice charge with the Board.

Because the Agreement is facially neutral and the Board has overruled the precedent on which ALJ Olivero relied, ALJ Olivero must review the Agreement under the newly articulated *Boeing* test. In *Boeing*, the Board requires an assessment of whether a facially neutral rule or policy fits into one of three categories. "Category I" rules are lawful to maintain, either because (i) when reasonably interpreted, they do not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by legitimate business justifications. "Category II" rules warrant individualized scrutiny to determine whether they would prohibit or interfere with NLRA rights, and, if so, whether the adverse impact on NLRA rights is outweighed by legitimate justifications. "Category III" rules are unlawful to maintain because they prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rules. *Boeing*, 365 NLRB at sl. op. 3-4.

The Agreement does not include any language which reasonably can be read to discourage or prevent employees from filing unfair labor practice charges with the Board. To the contrary, as ALJ Olivero already determined, the Agreement is silent on whether employees may file a charge with the NLRB. Accordingly, the case should be remanded to ALJ Olivero to consider whether the Agreement's failure to affirmatively advise employees of a right to file

charges with the NLRB violates the Act. In making this determination. ALJ Olivero must consider that the Agreement states that the employee is waiving his/her right to have a "dispute decided in court or by a jury," a right or remedy not available when an employee files an unfair labor practice charge.

The Agreement, therefore, must be evaluated as "Category I" work rule under the *Boeing* analysis. As such, it would be expected that, based on the record evidence, ALJ Olivero will conclude that nothing in the Agreement prohibits or interferes with an employee's exercise of NLRA rights. Accordingly, the Agreement is lawful under *Boeing*.

Even if, however, ALJ Olivero was to conclude that because the Agreement fails to explicitly inform employees of their right to file charges at the NLRB it *might* interfere with an employee's protected right to file a charge, that potential impact is outweighed by Respondent's business justifications for the Agreement. The Agreement is premised on the desire to "[gain] the benefits of a speedy and impartial dispute-resolution procedure which may arise … concerning your employment …" (ALJD at p. 2). The Supreme Court recently reaffirmed the lawfulness and enforceability of arbitration agreements for this purpose in *Epic Systems Corporation v. Lewis*, 584 U.S. ___ (May 21, 2018; Nos. 16-285, 16-300 and 16-307). In short, the absence of language specifically advising employees that their right to file an unfair labor practice charge is not inhibited by the Agreement does not doom the lawfulness of the Agreement. Given the now recognized enforceability of such agreements, any potential adverse impact on Section 7 rights is outweighed by Alorica's business justification for the Agreement.

III. Respondent's Treatment of Fultz and Washington Did Not Violate the Act

Finally, ALJ Olivero concluded that because the Agreement violates Section 8(a)(1) as discussed above, Respondent unlawfully discharged employees Fultz and Washington for refusing to execute the document. It is axiomatic that if ALJ Olivero determines that the

Agreement is lawful applying *Boeing* her conclusion that Respondent unlawfully threatened Fultz and Washington with termination if they continued to refuse to sign the Agreement and by terminating their employment for refusing to sign the Agreement must also be overturned.

CONCLUSION

For all the foregoing reasons, the above-captioned case should be remanded to ALJ Olivero for further proceedings to comply with the Board's Decision in *Boeing*.

DATED this 13th day of November 2018

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CERTIFICATE OF SERVICE

I certify that on November 13, 2018, a copy of the foregoing **RESPONDENT ALORICA INC. AND ITS SUBSIDIARY/AFFILIATE EXPERT GLOBAL SOLUTIONS, INC.'S RESPONSE TO NOTICE TO SHOW CAUSE SUPPORTING REMAND TO THE ALJ FOR FURTHER PROCEEDINGS CONSISTENT WITH THE BOARD'S DECISION IN *BOEING*** was Electronically Filed as a .pdf document via the NLRB's e-filing system and transmitted via e-mail and Federal Express to the following parties:

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